

MEMORANDUM

TO: Len Rubin

FROM: Sandy Brown
John Podvin, Jr.

DATE: January 26, 1999

RE: Summary of Insurance Provisions
Financial Services Act of 1999 ("H.R. 10")

Following is an analysis of the insurance provisions of H.R. 10 with respect to its impact on the ability of community banks to engage in the sale of insurance.

SHORT ANSWER

The insurance provisions of H.R. 10 are a rollback of the existing powers of community banks and will make it more difficult for them to enter into the insurance business in the future. Below, in bullet point format, is a section-by-section analysis of the insurance provisions of H.R. 10.

SECTION 104 - OPERATION OF STATE LAW

- Affiliations between banks and insurance companies may not be prevented or restricted by state law. However, state law may require detailed information specified in Section 104(a)(2) from any entity seeking such an affiliation. **This will substantially increase the already high regulatory burden on bank/insurance affiliations in a manner that would likely vary among the 50 states.**
- **The Barnett case is significantly undercut by Section 104(b)**, by preserving 13 separate areas where state law may impose discriminatory restrictions on bank insurance sales. This section would fundamentally change many years of legal decisions concerning the Comptroller of the Currency's interpretation of the National Bank Act and the Supreme Courts' interpretations of the supremacy clause and administrative law.

TITLE III - INSURANCE

SUBTITLE A - STATE REGULATION OF INSURANCE

- Section 303 **authorizes functional regulation by the States** concerning insurance sales activities by any person or entity in accordance with Section 104, which authorizes discriminatory state regulation for banks that wish to enter into the insurance sales business.
- Section 304 **limits national bank (including bank subsidiaries) underwriting of insurance to products authorized by the Comptroller of the Currency as of January 1, 1997**, that do not involve title insurance or annuity contracts and where no court of relevant jurisdiction had, by final judgment, overturned such determination by the Comptroller of the Currency that national banks may provide such a product as principal. Insurance is defined (for purposes of underwriting) to include any product regulated as insurance under state insurance law and includes annuity contracts.
- Section 305 **codifies the prohibition against national banks engaging in any activity involving underwriting of title insurance**, including activities conducted in a affiliate or subsidiary as defined in Section 2 of the Bank Holding Company Act of 1956.
- Section 306 creates a system for dispute resolution between state insurance regulators and federal regulators concerning whether a product is or is not insurance. Review of these disputes by courts shall be conducted "without unequal deference", which **undermines the deference to the Comptroller of the Currency developed through case law interpreting the National Bank Act, the Supremacy Clause and administrative law, as set forth most recently in the VALIC case.**
- Section 307 **effectively codifies the Interagency Statement for Retail Sales of Nondeposit Investment Products**. This is accomplished by adding a section to the Federal Deposit Insurance Act that would require any insured depository institution to comply with the restrictions in this bill and with consumer protection regulations jointly issued by the Federal agencies implementing this section. These regulations also are extended to any subsidiaries of an insured depository institution but not to affiliates, such as a bank holding company subsidiary. In addition, the regulations

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adopted by the Federal banking agencies under Section 307 will only preempt State consumer protection laws if the State law in question is less stingiest in terms of consumer protection than the Federal regulations.

- Violation of the insurance provisions contained in the safe harbor under Section 104 and of the Consumer Protection Provisions in Section 307 **could subject banks to private lawsuits, including class actions**, in addition to regulatory enforcement actions brought by banking and insurance regulatory agencies. Finally, Section 307 would likely **add tremendous amounts of discriminatory regulatory burden on the banking industry**.

The bottom line is we believe that these insurance provisions would effectively preclude most community banks from engaging in the agency sale of insurance and annuities products. Furthermore, we are very concerned about the precedent that H.R. 10 establishes in removing deference to the Comptroller in interpreting the National Bank Act. In addition, H.R. 10 essentially forces all insurance activities to be conducted in a holding company subsidiary, which may make it more difficult for some community banks to engage in insurance-related activities. Finally, if H.R. 10 is passed in its present form, the complicated structure that it establishes will provide a great deal of litigation which is not in the best interest of community banks.

SMB

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